NO. 21822

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRED STEIN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Statutes and Codes

Rules

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I

JURISDICTION

This is an appeal from an order of the United States District Court for the Southern District of California, entered January 4, 1967, denying appellant's Motion to Vacate and Set aside his sentence, judgment and indictment under the provisions of Title 28, United States Code, Section 2255.

The jurisdiction of the District Court rested on Title 18, United States Code, Section 371, Title 21, United States Code, Section 174, and Title 28, United States Code, Section 2255.

This Court has jurisdiction to review the judgment of the District Court denying appellant's "2255 Motion," pursuant to

Title 28, United States Code, Sections 1291 and 1294.

II

STATUTE INVOLVED

Title 28, United States Code, Section 2255 provides as follows:

> "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the Court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> "Unless the motion and files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issue and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by

law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

"A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

"The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

"An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

"An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to

test the legality of his detention."

III

STATEMENT OF THE CASE

On March 5, 1958, a six count indictment was returned by the Grand Jury for the Southern District of California, charging conspiracy and sale of heroin in violation of Title 18, United States Code, Section 371, and Title 21, United States Code, Section 174. On September 22, 1958, appellant was convicted after a court trial before the Honorable Peirson M. Hall, United States District Judge, on Counts Two, Three, Four, Five and Six of the indictment. On September 23, 1958, the petitioner was sentenced to the custody of the Attorney General for imprisonment for a period of twenty years on Count One; Twenty years on Count Three, to run concurrent with and not consecutive to the sentence on Count One; ten years on Count Four to run consecutive to and not concurrent with sentence on Counts One and Three; ten years on Count Five to run consecutive to and not concurrent with sentence on Count Four; ten years on Count Six to run consecutive with and not concurrent with Sentence on Count Five, making a total of fifty years.

Thereafter, the appellant appealed this conviction and sentence which was affirmed by the Court of Appeals for the Ninth Circuit on November 16, 1959, 271 F. 2d 895.

On February 26, 1960, appellant filed a petition for writ of certiorari which was denied by the Supreme Court on April 18, 1960,

362 U. S. 950.

On September 28, 1961, appellant filed his first motion pursuant to Title 28, United States Code, Section 2255. On May 17, 1962, the District Court denied the motion. On June 11, 1962, petitioner appealed the District Court's ruling to the Court of Appeals for the Ninth Circuit where the Court of Appeals affirmed the denial of the appellant's motion, 313 F. 2d 518 (1962), cert. denied, 375 U. S. 872.

On May 27, 1966, the appellant filed the instant 2255 motion alleging:

(1) That the Government knowingly used perjured testimony, and (2) that appellant's trial counsel acted in collusion with agents of the United States so as to deprive him of effective assistance of counsel.

On January 4, 1967, this motion was denied by the District Court. It is from this denial of that motion that the present appeal arises.

IV

ARGUMENT

A. APPELLANT'S MOTION WAS PROPERLY DENIED AS TO THE PROSECUTION'S ALLEGED KNOWING USE OF PERJURED TESTIMONY

The movant in a 2255 proceeding has the burden of sufficiently

alleging, as well as proving by a preponderance of the evidence, that his constitutional rights were violated at the trial, and such burden is particularly severe if the judgment of conviction has already been affirmed.

Twining v. United States, 321 F. 2d 432 (5th Cir. 1963), cert. den. 376 U. S. 965 (1964);

Miller v. United States, 261 F. 2d 546 (4th Cir. 1958);

Bishop v. United States, 223 F. 2d 582 (D. C. Cir. 1955), vacated on other grounds, 350 U. S. 961 (1956);

United States v. Robinson, 143 F. Supp. 286 (W. D. Ky. 1956).

It is well established law that a judgment and sentence will not be vacated on the ground of perjured testimony unless the moving party alleges, and later shows by a preponderance of the evidence, that (1) the testimony was perjured, and (2) the prosecuting officials knowingly and intentionally used such testimony to secure a conviction.

Mooney v. Holohan, 294 U. S. 103, 112 (1935);

Black v. United States, 269 F. 2d 38 (9th Cir. 1959), cert. den. 361 U. S. 938 (1960);

Holt v. United States, 303 F. 2d 791 (8th Cir. 1962);

United States v. Mauriello, 289 F. 2d 725 (2nd Cir. 1961);

Smith v. United States, 252 F. 2d 369, 371 (5th Cir. 1958);

United States v. Jakalski, 237 F. 2d 503 (7th Cir. 1957), cert. den 353 U. S. 939 (1957), reh. den. 353 U. S. 978 (1957);

Taylor v. United States, 229 F. 2d 826 (8th Cir. 1956), cert. den. 351 U. S. 986 (1956);

United States v. Rutkin, 212 F. 2d 641 (3rd Cir. 1954);

Tilghman v. Hunter, 167 F. 2d 661 (10th Cir. 1948).

The movant additionally must prove that the alleged perjured testimony was so material as to contribute to the conviction and of such substance, in relation to the evidence at trial, as to violate movant's right to due process.

Perry v. United States, 297 F. 2d 100 (9th Cir. 1962);

Weaver v. United States, 263 F. 2d 577 (8th Cir. 1959), cert. den. 359 U. S. 1014 (1959);

Griffin v. United States, 258 F. 2d 411 (D. C. Cir. 1958), cert. den. 357 U. S. 922;

Smith v. United States, supra;

United States v. Gonzalez, 33 F. R. D. 280 (S. D. N. Y. 1960), aff'd 321 F. 2d 638 (2nd Cir. 1963).

Specifically appellant alleged that the Government knowingly used perjured testimony in that Quentin Browning, Clarence Winfrey and Celeste Winfrey, unindicted co-conspirators, falsely testified against the appellant at his trial.

1. Testimony of Unindicted Co-Conspirator Browning.

The sole issue at trial was whether or not appellant conspired to and did sell heroin to Clarence and Celeste Winfrey. The Winfreys testified that they purchased heroin from appellant, and Browning corroborated their testimony.

Appellant alleged that Browning falsely testified that he was not addicted to heroin. The unsubstantiated allegation that Browning's testimony was perjured merely questions the witness' credibility, which is not reviewable under a Section 2255 motion. Browning's alleged addiction is clearly immaterial to the sole factual issue presented at trial, and therefore even clear proof of this allegation would not be grounds for vacating appellant's judgment and sentence.

Appellant's allegation that Browning falsely denied that his testimony was motivated by promises affecting his own illegal activities is not substantiated by any evidence. The motion simply states the conclusion. Thus, this allegation merely questions the credibility of the witness when he gave this testimony. An appellate court will not second guess the trier of fact who has heard the testimony, scrutinized the witness and noted their demeanor and behavior on the witness stand.

Davis v. United States, 327 F. 2d 301 (9th Cir. 1964);

Maldanado v. United States, 325 F. 2d 295 (9th Cir. 1963);

Perez v. United States, 297 F. 2d 648 (9th Cir. 1961).

This rule is especially strong in proceedings under Section 2255.

Dean v. United States, 265 F. 2d 544 (8th Cir. 1959);

United States v. Rosenberg, 200 F. 2d 666, 671 (2nd Cir. 1952), cert. den. 345 U. S. 965 (1953), rehearing denied, 345 U. S. 1003 (1953).

The above allegations by appellant as well as those following and discussed in paragraph B of this brief, are completely unsubstantiated either by testimony or the record and files in this matter. It is well established that mere conclusionary allegations are not sufficient to warrant relief under a 2255 motion.

Sanders v. United States, 373 U. S. 1;

United States v. Miller, 339 F. 2d 581 (9th Cir. 1964);

Heisler v. United States, 321 F. 2d 641 (9th Cir. 1963).

2. The Proffered New Evidence is Merely Rebuttal to the Winfrey's Testimony and Cannot be Considered under Rule 33, Federal Rules of Criminal Procedure.

Appellant offers his motion to produce "recently acquired proof which will refute in toto" the Winfreys' testimony. Such evidence does not present the new factual question of perjury, thereby requiring a full hearing under Section 2255; rather it is simply an offer of new evidence going to the issue which was

originally presented at trial.

Rule 33 of the Federal Rules of Criminal Procedure permits the Court to consider new evidence "within two years after final judgment." Since appellant's appeal from his conviction was finalized more than seven years ago, Stein v. United States, 271 F. 2d 895 (9th Cir. 1959), cert. den. 362 U. S. 950 (1960), this new evidence cannot now be considered.

B. APPELLANT'S MOTION WAS PROPERLY DENIED AS TO THE ALLEGED COLLUSION BETWEEN TRIAL COUNSEL AND PROSECUTION AS THIS ISSUE WAS PREVIOUSLY DISPOSED OF ON DIRECT APPEAL.

It is well settled that issues disposed of on a previous direct appeal are not reviewable in a subsequent petition under Section 2255.

Marcella v. United States, 344 F. 2d 876, 880 (9th Cir. 1965), cert. den. 382 U. S. 1016 (1966);

Anthony v. United States, 331 F. 2d 687, 693 (9th Cir. 1964);

United States v. Bailey, 337 F. 2d 218 (9th Cir. 1964);

Medrano v. United States, 315 F. 2d 361 (9th Cir. 1963) cert. den. 375 U. S. 854 (1963);

Fiano v. United States, 291 F. 2d 113 (9th Cir. 1959), cert. den 368 U. S. 943 (1961);

Kyle v. United States, 266 F. 2d 670 (2nd Cir. 1955).

In his direct appeal from conviction appellant argued in Point III of his brief that "Attorney Sweeney's defense of the appellant in trial was inadequate and incompetent, so much so that the appellant did not have a trial within the meaning of the Sixth and Eighth Amendments of the constitution."

The Court of Appeals in its opinion discussed the question of competent counsel at great length and concluded at 271 F. 2d 895 at p. 899:

> "I know of nothing that any other or additional counsel could have done that you, Mr. Sweeney, didn't do in the protection of this defendant's rights. The case was tried skillfully and adroitly on behalf of defendant by you. We ask the question, what defenses were open to a defendant where the witnesses were fellow law breakers other than to attack their credibility? Mr. Sweeney did this by an able cross-examination. In this examination he exhibited no terror. He was alert and prompt with objections and forceful in argument. Our experience as trial judges for many years, from which we cannot disassociate ourselves, convinces us that appellant received a better than average defense and that his interests were fully and expertly protected."

In contrast to this summary of an able defense by an "adroit"

and "skillful" trial counsel, it has often been said that where trial counsel was of appellant's own choosing, as was the case here, a charge of inadequate representation can prevail only if "what was or was not done by the defendant's attorney for his client made the proceedings a farce and a mockery of justice, shocking to the conscience of the Court."

Cofield v. United States, 263 F. 2d 686, 689 (9th Cir. 1959), rev'd. on other grounds, 360 U. S. 472 (1959);

United States v. Miller, 254 F. 2d 523 (2nd Cir. 1958); cert. den. 358 U. S. 868 (1958);

O'Malley v. United States, 285 F. 2d 733 (6th Cir. 1961);

Mitchell v. United States, 259 F. 2d 787, 792 (D. C. Cir. 1958), cert. den. 358 U. S. 850 (1958);

Diggs v. Welch, 148 F. 2d 667, 670 (D. C. Cir. 1945), cert. den. 325 U. S. 889 (1945).

The same above quoted characteristic of trial counsel noted by this Court in the original appeal are equally applicable in disproving the allegation of collusion. It is inconsistent that defense counsel who "skillfully and adroitly" represented the appellant at trial, who ably cross-examined, was alert and prompt with objections and who forcefully argued the case can now be properly accused of consorting with the prosecution.

Moreover, the allegation is unsubstantiated. In his brief,

appellant claims only that if the officials were put under oath they "would be required to sustain the allegations contained in the motion." We submit that appellant is simply on a fishing expedition, and that the thorough consideration given to this entire subject by this Court on the previous direct appeal precludes the relitigation now sought by appellant.

CONCLUSION

The trial court properly denied the instant motion on the grounds that the alleged perjury was not material to the central issue at trial and that the introduction of new evidence if there be any is barred by Rule 33 of the Federal Rules of Criminal Procedure.

The records, files and petition do not support appellant's contention that defense counsel was in collusion with Government agents. On the contrary appellant received effective, competent and forceful assistance of counsel.

The District Court did not err in denying appellant's 2255 motion on the above grounds and its judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Robert M. Talcott
ROBERT M. TALCOTT